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No. 90-1279

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MYRA JO COLLINS,
Petitioner,

v.

CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, COUNCIL OF STATE GOVERNMENTS, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, AND NATIONAL GOVERNORS' ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Amici curiae will address the following questions:

1. Whether a municipality can be held liable under 42 U.S.C. § 1983 to a municipal employee for subjecting the employee or causing the employee to be subjected to a violation of federal rights when there has been no allegation that the municipality has abused its governmental authority.

2. Whether, under *City of Canton v. Harris*, 489 U.S. 378 (1989), a municipality can be held liable under Section 1983 for acting with "deliberate indifference" to its employee when there is no allegation that any municipal employee violated the Constitution.

3. Whether the Due Process Clause of the Fourteenth Amendment obligates municipal governments affirmatively to ensure their employees' safety.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. The questions presented in this case will have a substantial impact on local governments' exposure to federal damages claims under 42 U.S.C. § 1983 for physical injuries incurred by their employees in the workplace.

In addition to the obligations and responsibilities imposed upon local governments pursuant to state law, petitioner is seeking to establish an affirmative and costly obligation under Section 1983 and the United States Constitution to ensure "safe" working conditions for municipal employees. This case therefore presents important issues concerning the scope of municipalities' affirmative duties under federal law. Because this Court's decision will have a direct impact on matters of fundamental importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner seeks to transform an ordinary tort claim into a federal constitutional case merely because the defendant happens to be a local government. Petitioner's husband, an employee of the City of Harker Heights, died after being exposed to poisonous sewer gases while on the job. Having successfully pursued her state law remedies, petitioner filed a complaint under 42 U.S.C. § 1983, alleging that the City had violated her husband's substantive due process rights to life and liberty. The court of appeals affirmed the dismissal of petitioner's claim on the grounds that her allegations failed to state a claim under Section 1983. This Court should affirm the judgment of the court of appeals on any of three separate grounds.

I.

Section 1983 imposes liability upon a state actor who "subjects or causes to be subjected" another person to a deprivation of federally protected rights. In ordinary usage, the phrase "subjects or causes to be subjected" implies the exercise of coercion or force characteristic of the relationship between government and the governed, rather

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

than the consensual relationship between employer and employee. Furthermore, the legislative history demonstrates that Congress intended Section 1983 to reach instances in which a State actively denies or deliberately allows others to trample upon individual rights, not to impose affirmative obligations on the States. In accordance with this congressional intent, this Court has consistently described Section 1983 as addressing abuses of *governmental* power. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 657 (1980); *Monroe v. Pape*, 365 U.S. 167, 172 (1961). Because the City in this case was acting as an employer and not as a government, it is not subject to liability under Section 1983.

II.

Petitioner's allegations are insufficient to impose liability upon a municipality under Section 1983. This Court has held that a city is liable for constitutional torts in either of two situations, *viz.*, the city has an unconstitutional policy that is implemented by an employee, or an employee acts unconstitutionally and the city has taken action as a result of which it must bear responsibility for that unconstitutional act. *Compare Monell v. Department of Social Servs.*, 436 U.S. 658 (1978) *with City of Canton v. Harris*, 489 U.S. 378 (1989). There is no allegation in this case that Harker Heights has any unconstitutional policy or custom to expose its employees to physical injury on the job. Nor does petitioner allege that any employee of Harker Heights committed a violation of decedent's constitutional rights for which the City could be held responsible. Accordingly, the complaint, which seeks relief exclusively against the municipality, was properly dismissed.

III.

The complaint does not state a violation of an underlying federal constitutional or statutory right, as required in a Section 1983 claim. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). In general, the Due Process Clause only

forbids the States from actively interfering with guaranteed personal liberties. It does not ordinarily require a State to provide affirmative protective services to any individual, even if the State is aware of danger to that individual. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989). Any affirmative obligation imposed by the Constitution is strictly limited to cases where "the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself." *Id.* at 200. The employment relationship is not comparable to involuntary custody. Because the City did not "so restrain[] [Collins'] liberty that it render[ed] him unable to care for himself," it was under no constitutional obligation to provide him with affirmative protective services. *Id.*

The City was also under no constitutional obligation arising out of the Texas Hazard Communication Act, Tex. Rev. Civ. Stat. Ann. art. 5182b (West 1987).[2] Although this Court has in some cases found state statutes to create interests that are protected by procedural due process, it has never extended the more restrictive interest. In addition, no case has found a protected interest to arise out of any statute of general applicability to private parties as well as to the State. In this case, petitioner asks the Court to infer a substantive due process right to affirmative benefits from a statute of general applicability. There is no basis for the Court to infer such a right in this case.

[2] The Texas Hazard Communication Act, Tex. Rev. Civ. Stat. Ann. art. 5182b was subsequently recodified as Tex. Health & Safety Code Ann. § 502.001, *et seq.* (West 1991). Citations in this brief are located in the Appendix to Petitioner's Brief at A2-A18.

ARGUMENT

The court of appeals held that the alleged failure of a municipal government adequately to protect its employee from an ordinary hazard of employment does not give rise to a cause of action under 42 U.S.C. § 1983. This holding is unquestionably correct. There is simply no reason to permit a Section 1983 claim alleging a substantive due process violation to proceed against a city any time an individual employee is injured within the scope of his employment. That is not what either Section 1983 or the Due Process Clause was intended to accomplish. Accordingly, the court of appeals correctly held that Section 1983 may be invoked only when there is an allegation of abuse of governmental authority.

The fundamental principle that Section 1983 may be invoked by a municipal employee plaintiff only when the government defendant has abused its governmental power is supported by both the language and the legislative history of Section 1983. First, it can fairly be inferred from the statutory requirement that the government must "subject[] or cause[] to be subjected" an individual to a deprivation of a federal right in order to incur liability under Section 1983. Moreover, the legislative history demonstrates that when Congress enacted Section 1983, it intended not to impose affirmative duties upon governmental actors. This construction of Section 1983 is also supported by the opinions of this Court.

If, however, the Court declines to give this reading to Section 1983, the judgment of the court of appeals should nonetheless be affirmed. The complaint does not state an adequate basis for municipal liability under *City of Canton v. Harris*, 489 U.S. 378 (1989), and, more fundamentally, does not allege an underlying violation of the Due Process Clause. It does not allege that the City did anything to deprive the decedent of his life. Instead, it alleges that the City failed to fulfill an affirmative duty to protect the

decedent's personal safety and security while on the job. Outside of the context of confinement by the State, however, the Due Process Clause does not impose affirmative duties on municipalities, but only prohibits them from *depriving* individuals of their life, liberty or property.

The conclusion that there is no municipal liability in this case is of the utmost importance to *amici*. Whether the Court reaches that conclusion on the basis of the statute or the Constitution itself is less important than that the Court reach the correct outcome—failure of a municipal government to prevent its employees from being injured on the job is not actionable under federal law.

I. PETITIONER'S COMPLAINT DOES NOT ALLEGE A VIOLATION OF SECTION 1983.

A. The Language And History Of Section 1983 Demonstrate That It Is Limited To Cases Where The State Actor Has Abused Governmental Power.

Section 1983 provides that "[e]very person who, under color of [law], . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983. In its ordinary usage, the phrase "subjects or causes to be subjected" implies an element of coercion or exercise of force that is absent from consensual or contractual relationships, including employment relationships. Thus, a contemporary source defined "subjection" as follows: "The *obligation* of one or more persons to act at the discretion or according to the judgment and will of others." 2 Bouvier's Law Dictionary 553 (11th ed. 1865) (emphasis added).[3]

[3] Subjection was separated into two categories: private subjection, such as that of parents over children; and public subjection, of government over the citizenry. 2 Bouvier's Law Dictionary 553 (11th ed. 1865).

Section 1983 was enacted by Congress in 1871 as part of the Ku Klux Klan Act. The Act was a direct response to the "lawless conditions" of the Reconstruction South, *Monroe v. Pape*, 365 U.S. 167, 174 (1961), in which vigilante groups frequently violated the constitutional rights of Union sympathizers and the recently freed slaves. State and local officials made such abuses possible by their tacit approval and their unwillingness to enforce relevant state laws. *See id.* at 176 ("The outrages committed upon loyal men [in Virginia] are under the forms of law.") (quoting Rep. Porter); *id.* at 230-31 n.46 (Frankfurter, J., dissenting) (describing Southern states' "systematic failure to make arrests, to put on trial, to convict, or to punish offenders").

Section 1983 was intended to eliminate state-sanctioned violence and abuse of power and provide a federal forum and cause of action to citizens aggrieved thereby. *Id.* at 237 (Frankfurter, J., dissenting). Although the reach of Section 1983 was meant to be broad, Congress declined to adopt the Sherman Amendment, which would have imposed upon state and local governments an affirmative obligation to keep the peace. *Monell v. Department of Social Servs.*, 436 U.S. 658, 679 (1978). *See id.* at 679-80 ("But the enforcing a [sic] liability, existing by . . . State law, in the courts, is a very widely different thing from devolving a new duty or liability upon [the States] by the national Government.") (quoting Rep. Poland). Congress also was concerned that Section 1983 not prevent state actors from "exercising 'necessary and customsary functions.'" *Owen v. City of Independence*, 445 U.S. 622, 672 (1980) (Powell, J., dissenting) (quoting Rep. Kerr). *See Monell*, 436 U.S. at 678 (congressional concern that "the Nation could not impose duties on state officers since that might impede States in their legitimate activities").

Consistent with the language and legislative history of the statute, this Court often has spoken of Section 1983 as targeted at the abuse of governmental authority. For

example, in *Monroe* the Court described Section 1983 liability as addressing "an official's abuse of his position." 365 U.S. at 172. In his concurrence in *Parratt v. Taylor*, 451 U.S. 527 (1981), Justice Powell similarly explained that "[Section 1983] was enacted to deter real *abuses* by state officials in the exercise of governmental powers." *Id.* at 549 (Powell, J., concurring) (emphasis in original). *See also Owen*, 445 U.S. at 657 (under Section 1983, "[t]he innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated"); *Robertson v. Wegmann*, 436 U.S. 584, 591 (1978) (purpose of Section 1983 was "prevention of abuses of power"); *Paul v. Davis*, 424 U.S. 693, 717 (1976) (Brennan, J., dissenting) (("The essential element of this type of § 1983 action is *abuse* of his *official position*") (emphasis in original) (footnote omitted)).

Given the legislative history and judicial interpretation of Section 1983, the language "subjects or causes to be subjected" does not encompass a claim by an employee injured on the job by an ordinary hazard of employment. The City of Harker Heights did not "subject" Collins to the loss of his life or liberty by the use of coercion or force. Nor did the City willfully cause Collins to be subjected to such abuse at the hands of another person. At most, petitioner alleges that respondent failed to take sufficient steps to protect Collins from the ordinary hazards he encountered on the job. To impose federal liability under such circumstances would be to create the type of expansive affirmative duty that Congress intended to avoid, rather than enforcing the States' obligation not to subject individuals to deprivations of their fundamental constitutional rights.

For these reasons, the court of appeals was correct when it held that Section 1983 claims by municipal employees are limited to circumstances involving abuse of governmental power. Under the Fifth Circuit's holding,

Section 1983 applies only where the government *qua* government wrongfully "subjects" a person to constitutional injury. The requirement of an abuse of governmental authority forecloses claims—such as this one—where the injury is allegedly attributable to a municipal government *solely* because the injured person was acting as a municipal employee at the time of the injury.

B. The Requirement Of Abuse Of Governmental Power Will Properly Restrict The Sweep Of Section 1983.

Applying Section 1983 in the circumstances of this case would constitutionalize many claims that otherwise would be the exclusive subject of state tort and workers' compensation laws. This Court consistently has dismissed such efforts to "federalize" state law. In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Court rejected an interpretation of the Due Process Clause that would create "a right to be free of injury wherever the State may be characterized as the tortfeasor [and] make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *See also Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law' [for which remedy] must be sought in state court under traditional tort-law principles"). As the Court recently reiterated, "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

The attractiveness of petitioner's legal theory to future potential plaintiffs is obvious—virtually any workplace injury can be characterized as attributable to inadequate training or supervision. Once this minimal pleading hurdle is overcome, the plaintiff gains the benefits of ac-

cess to federal court as a Section 1983 claimant, including broad discovery rights, the right to have damages assessed by a jury, and the right to recover attorneys' fees under 42 U.S.C. § 1988. While municipalities will bear substantial litigation costs and risks, pursuit of a Section 1983 remedy is risk-free for the plaintiff: even if the plaintiff does not prevail on his due process/Section 1983 claim, he, like petitioner, retains all of his state common law, statutory, and administrative remedies.

If local governments are subjected to open-ended damages claims (including attorneys' fees) under Section 1983 for every work-related injury incurred by a municipal employee, federal law will improperly place them at a competitive disadvantage in relation to private employers operating in the same spheres, such as education and mass transit. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 439 (1980) ("when acting as proprietors, States should similarly share existing freedoms from federal constraints [as those enjoyed by private actors]"). Furthermore, in an era of tight fiscal resources, local governments would be compelled to reduce essential services in order to defend, compromise, or pay judgments in personal injury suits brought by public employees under Section 1983.

Under the theory of Section 1983/due process liability advocated by petitioner, every injury to a municipal employee that can be alleged, in hindsight, to be attributable to inadequate training or safety procedures will give rise to a federal claim. Such an approach would transform Section 1983 into the "font of tort law" against which this Court has warned. *Paul*, 424 U.S. at 701. The Court previously has rejected similar efforts to expand Section 1983 beyond its intended reach, and this case requires the Court to do so again.

II. PETITIONER'S COMPLAINT FAILS TO STATE A CLAIM OF MUNICIPAL LIABILITY UNDER SECTION 1983.

Petitioner's complaint does not seek to impose liability upon any individual government actor; instead, it is aimed exclusively at the City of Harker Heights. Even if petitioner's allegations were sufficient to state a claim under Section 1983 against an individual government actor despite the absence of any claim of abuse of governmental authority, they clearly are insufficient to state a claim directly against the respondent City.

It is well settled that a municipality cannot be held liable under Section 1983 on a theory of *respondeat superior*. *Monell v. Department of Social Servs.*, 436 U.S. 658, 691-94 (1978). Instead, municipalities are liable "only when the 'execution of the government's policy or custom . . . inflicts the injury.'" *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (quoting *Springfield v. Kibbe*, 480 U.S. 257, 267 (1987) (O'Connor, J., dissenting)).

This Court has recognized two types of claims against local governments under Section 1983, neither of which is stated by petitioner. *First*, Section 1983 liability can be imposed upon a city if it has adopted a policy or custom that is itself unconstitutional and that is implemented by one of its employees. Thus, for instance, in *Monell* the city council had adopted an unconstitutional policy of compelling pregnant employees to take unpaid leaves of absence. The plaintiff's employment had been terminated by a supervisor who implemented that policy. 436 U.S. at 661-62. Similarly, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 473 (1986), the plaintiff was arrested by police officers implementing a policy of the County Attorney that violated the Fourth Amendment.

In this case, petitioner does not allege that the City of Harker Heights has a policy or custom of injuring its employees. There is no claim that decedent was sent into

the sewer by his supervisor in furtherance of a deliberate governmental choice to cause him bodily injury. Indeed, any such allegation would be absurd on its face.

Second, the Court held in *Canton* that a municipality sometimes can be liable under Section 1983 even when its policy is not itself unconstitutional. While Canton's policy of providing detainees with medical care was unquestionably consistent with the Constitution, *see* 489 U.S. at 386-87, this did not end the inquiry. Instead, the Court held "that there are *limited circumstances* in which an allegation of a 'failure to train' can be the basis for liability under § 1983." *Id.* at 387 (emphasis added). But in defining those circumstances, the Court held plainly that "[o]nly where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *Id.* at 389.

The logic of the holding in *Canton* is that, when a city itself does not have a policy that is unconstitutional, it will nonetheless be held accountable for the unconstitutional acts of its employees only when its deliberate choice not to train them "causes" an employee to violate *another's* constitutional rights. The city's liability is derivative. There must be an unconstitutional act committed by an employee of the city underlying the city's liability. And that act must in turn have been committed with the requisite scienter to establish a constitutional violation. *See Canton*, 489 U.S. at 388 n.8.

Petitioner errs by conflating the "deliberate indifference" standard for municipal liability identified in *Canton* with the similar constitutional requirement of scienter under the Due Process Clause. Thus, for instance, in a case where a police officer has shot and killed an individual, there is no due process violation if the officer acted negligently because a negligent act does not constitute a deprivation of due process. Accordingly, a city would not be liable under Section 1983 even if it had acted with

deliberate indifference in training the officer because there still would be no underyling constitutional violation.

Thus, under *Canton*, petitioner's Section 1983 claim against Harker Heights must include both an averment that a government employee violated the Constitution *and* a separate allegation of an intentional or deliberately indifferent policy or custom pursuant to which the City is responsible for that violation. Petitioner has alleged municipal indifference, but she fails to allege any action by a municipal employee that violated her husband's constitutional rights.[4] Because both allegations are required under Section 1983 as interpreted in *Canton*, this failure requires the complaint to be dismissed.

III. PETITIONER'S COMPLAINT DOES NOT ALLEGE THE DEPRIVATION OF ANY CONSTITUTIONAL RIGHT.

Even if this Court does not accept the analysis of Section 1983 advanced by *amici*, it should still affirm the dismissal of petitioner's complaint. The deprivation of a constitutional or federal statutory right is an essential element of a Section 1983 claim. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). Petitioner's attempt to frame her personal injury claim as a denial of due process is fundamentally flawed for the simple reason that the Due Process Clause is neither a substitute for tort law nor a charter of positive liberties that can be used to secure entitlements that the legislative branch has not seen fit

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[4] Moreover, petitioner fails to allege that anyone in the City of Harker Heights deliberately chose not to train Mr. Collins' supervisor and that this failure caused Mr. Collins' injury. Thus, the allegations fail to identify any municipal "act" upon which to impose liability. This absence of any allegation concerning any decision by a policymaker is fatal to petitioner's claim. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985) (a plaintiff cannot "establish municipal liability without submitting proof of a single action taken by a municipal policymaker").

to provide—such as a guarantee of a work environment without hazard.

A. The Failure Of A City To Take Affirmative Steps To Ensure Its Employee's Safety Does Not Constitute A Deprivation Of Life Or Liberty Without Due Process.

The Due Process Clause protects "liberty interests," including an individual's right to be free from the State's unjustified intrusions on personal security, from state deprivation. *See Ingraham v. Wright*, 430 U.S. 651, 673 (1977). Petitioner seeks to expand that right to impose upon municipalities an obligation affirmatively to guarantee their employees' freedom "from unreasonable risks to . . . life or personal security in the workplace." Pet. Br. 16. The Due Process Clause, however, is a *restraint* on the State's power to act. The liberty interest that it creates is a negative liberty—the right to be free from state interference.[5] Thus, the Clause neither confers a guarantee of a specified level of personal safety nor creates an individual right to the limited resources of government—even where access to those resources is necessary to secure a liberty or property interest which due process protects from active state interference. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989).

This Court consistently has rejected arguments that the Fourteenth Amendment affirmatively guarantees access to such rudimentary benefits as education, *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), housing, *Lindsey v. Normet*, 405 U.S. 56 (1972), or welfare assistance, *Dandridge v. Williams* 397 U.S. 471 (1970). Indeed, the Constitution does not require state or local governments to provide any services or benefits. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)

[5] The Due Process Clause of the Fourteenth Amendment provides that no State "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border").

The Court recently reaffirmed this fundamental limitation on the contours of the Due Process Clause in *DeShaney*. That case involved the assertion under Section 1983 of a substantive due process claim of a minor, Joshua DeShaney, who had been severely beaten by his father. Joshua sued the county for the failure of its social workers promptly to intervene to protect him after becoming aware of the father's violent conduct. Although the Court agreed that the failure of the social workers or "the State" to take affirmative steps to protect the child had led to tragic results and may have been actionable under state law, *see* 489 U.S. at 202-03, it held that the failure to act did not implicate the Due Process Clause. "If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them." *Id.* at 196-97.

The *DeShaney* Court explained that failure to take affirmative steps to prevent injury to a protected liberty interest does not give rise to a "deprivation" of due process because the Due Process Clause

> is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.

Id. at 195.[6] "While the State may have been aware of the dangers that Joshua faced in the free world, it played

[6] The history of the Due Process Clause likewise does not "support such an expansive reading of the constitutional text. Like its

no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. As long as the State "placed him in no worse position than that in which he would have been had it not acted at all," the state was not constitutionally liable for his injuries because "the State had no constitutional duty to protect Joshua." *Id.*

The due process claim in this case, like the claim in *DeShaney*, rests entirely on the failure of local government to take affirmative steps to protect a person who suffered serious physical injury. Pet. Br. 4-5 (City's failure "to train" and "to require [adequate] safety equipment to be on hand or used at the job site were all the cause of the . . . deprivation of . . . constitutional rights"). The only fair reading of the complaint is that it alleges that the City failed to protect the decedent from a risk of physical harm, which was also the core allegation in *DeShaney*. Because the municipality's failure to act in these circumstances cannot constitute a deprivation of a protected due process interest, the court of appeals properly affirmed the dismissal of petitioner's complaint.

B. The Existence Of An Employment Relationship Does Not Expand The City's Constitutional Obligations Under The Due Process Clause.

Petitioner attempts to distinguish *DeShaney* and related precedents by asserting that "decedent entered the sewer line in which he died *as part of his job* and at the instance of the City and its supervisors. . . . Thus his injury was caused by acts performed under color of state law, and no efficient private actor intervened." Pet. Br. 22 (emphasis added). In other words, petitioner argues that the fact that Collins was acting within the scope of his municipal employment is sufficient to "allege[] affirmative actions . . . under color of state law that directly and proximately caused decedent's death, in violation of his Due Process rights to life, liberty and personal security." *Id.* at 21-22.

Under petitioner's theory, *every* on-the-job injury to a municipal employee would constitute a "deprivation" of due process—regardless of any affirmative conduct by a state actor—because the injury would be "caused" in some sense by the fact of employment. As petitioner puts it, if Collins were not employed by the City he would not have "entered the sewer line in which he died as part of his job. . . ." Pet. Br. 22. Petitioner thus argues that municipal employment creates an affirmative obligation on the part of the municipal government to ensure the employee's safety, *i.e.*, that "the government employer owes its employees [a] substantive due process obligation to warn, train, supervise and equip them. . . ." *Id.* at 32. This argument is erroneous.

Affirmative due process obligations arise in the limited circumstance where state action has eliminated an individual's recourse to self-help, principally in cases involving detainees, inmates, and the involuntarily committed. For example, in *Estelle v. Gamble*, 429 U.S. 97 (1976), the Court held that the State has a duty to provide adequate medical treatment to incarcerated prisoners since "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met." *Id.* at 103. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court extended the same reasoning to involuntarily committed mental patients, holding that the Due Process Clause imposed on the State an "unquestioned duty to provide reasonable safety for all residents and personnel. . . ." *Id.* at 324. *See also City of Revere v. Massachusetts Gen. Hosp.*, 463

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counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression.'" *DeShaney*, 489 U.S. at 195-96 (quoting *Davidson v. Cannon*, 474 U.S. 344, 348 (1986)).

U.S. 239, 244 (1983) (city may have substantive due process obligation to a detainee in police custody).

As the Court explained in *DeShaney*, the "rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." 489 U.S. at 200. The Court emphasized, however, that the circumstances in which such an "affirmative duty" would be applicable were extremely narrow:

> The affirmative duty to protect arises . . . from the limitation which [the State] has imposed on [the individual's] freedom to act on his own behalf. In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf . . . which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. (citation omitted). In this case, the City's employment of Collins did not so restrain his liberty that it "render[ed] him unable to care for himself." Accordingly, that act of employment did not, as a matter of substantive due process, create any affirmative obligation to ensure his personal safety.[7]

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[7] The *DeShaney* Court rejected efforts to extend the imposition of affirmative duties under the Due Process Clause to situations where the individual remains at liberty to remove himself from danger. *See* 489 U.S. at 199-200 ("[*Estelle* and *Youngberg*] afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being").

Moreover, *DeShaney* makes clear that the existence of danger and the inability of the individual to protect himself is not enough to impose affirmative duties upon the State. Obviously, Joshua was placed in an inherently dangerous situation by being in the custody of his father, and as a minor he lacked any practical means of protecting himself. But this Court held that these facts alone were insufficient to demonstrate that the local government had deprived Joshua of due process by its failure to protect him. *DeShaney* defeats petitioner's argument that there is a substantive due process right to a hazard-free workplace. *See also Walker v. Rowe*, 791 F.2d 507, 510 (7th Cir.) ("The constitution no more assures a safe job than it does a job with a generous salary"), *cert. denied*, 479 U.S. 994 (1986); *Washington v. District of Columbia*, 802 F.2d 1478, 1481 (D.C. Cir. 1986) ("We have found no cases holding that [a government] employee's right to a safe workplace is secured by anything other than the state law of tort").

This is not to say, as petitioner mischaracterizes the Fifth Circuit's holding, that the employer-employee relationship can *never* give rise to a violation of due process protections. Pet. Br. 27-29. As this Court frequently has held, a State cannot use the employment relationship as an instrument for improper interference with its employee's enjoyment of independently conferred rights. *See, e.g., Rutan v. Republican Party*, 110 S. Ct. 2729 (1990) (First Amendment right to free expression); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989) (Fourth Amendment protection from unreasonable search and seizure). Similarly, the State may not, without appropriate procedures, affirmatively interfere with a protected interest in employment that it has created. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*,

408 U.S. 593 (1972). However, there is neither precedent in this Court's holdings nor logical support for the proposition that the employment relationship in itself imposes on the State any due process obligation to confer specific benefits, including a particular level of safety, upon its employees.

C. The Texas Hazard Communication Act Does Not Expand The City's Constitutional Obligations Under The Due Process Clause.

Petitioner argues that even if the Due Process Clause does not independently obligate the City to ensure Collins' safety, the Texas Hazard Communication Act confers upon Collins a liberty interest in specific warning, training, and safety measures, the denial of which constituted a deprivation of due process. This argument must fail for two reasons. First, the Act plainly does not cover Collins' situation. Second, even if the Act did require the City to undertake certain measures, that statutory requirement would not give rise to a substantive due process right.

1. *The Act Does Not Protect Workers In Collins' Position.*

Petitioner argues that the Act broadly "protects workers from hazardous chemicals, such as sewer gas." Pet. Br. 45. The plain language of the Act, however, demonstrates that it addresses the purposeful "use" or "handling" of chemicals, not merely passive or chance contact such as was experienced by Collins.

For example, petitioner relies on the final sentence of Section 10(a) of the Act, which requires training of employees "before working with or in a work area containing hazardous chemicals." The first sentence of the same section makes clear, however, that the training at issue was intended "for employees using or handling hazardous chemicals." Because Collins neither "used" nor "handled" the sewer gases to which he was exposed,

he was not "working with" those gases within the plain meaning of the statute. Similarly, under Section 10(b) of the Act the principal feature of the required training program is "information on interpreting labels and [documents containing chemical hazard and safe handling information]."[8] In fact, most of the Act's substantive provisions relate to required listing, labeling, and provision of information about chemicals used, stored, or purchased by employers. *See* Sections 6, 7, 8, 9. These provisions are plainly inapplicable to a chemical such as sewer gas, which is not packaged and labeled in normal use.

In short, the Act as a whole makes sense only as applied to chemicals provided or stored by an employer for deliberate use by employees. It has no application to employees such as Collins who may encounter atmospheric hazardous gases in the course of their duties.

2. *The Act Does Not Create A Protected Interest Under The Due Process Clause.*

Even if the Act could be interpreted to apply to Collins, the Act still would not create a protected interest under the Due Process Clause. *DeShaney* did not reach the question whether a statute promising state protective services to an individual created "an entitlement which would enjoy due process protection against state deprivation." 489 U.S. at 195 n.2. This case demonstrates why statutes of this sort ordinarily should not be considered to create substantive due process rights. Furthermore, even if under some circumstances there could be a substantive due process right to protective services conferred

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[8] The required training program also includes information on the "safe handling of hazardous chemicals *used* by the employees" and on "protective equipment . . . with respect to the hazardous chemicals *used* by the employees." Act, Section 10(b) (emphasis added).

by statute, the general provisions of the statute at issue here clearly create no such right.

Petitioner argues that the Act confers upon municipal employees a "right" to training and other safety measures, Act, Section 15, and that the "right" to these safety measures is therefore a protected liberty interest which the Due Process Clause absolutely precludes the City from denying. Petitioner's assertion differs in several significant respects from prior cases in which this Court has found state statutes to create protected interests under the Due Process Clause.

At the outset, the constitutional protection for which petitioner argues is not procedural but substantive due process. Although the procedural and substantive due process doctrines derive from the same constitutional text, they serve different purposes. Procedural due process "promotes fairness" in government decisions, whereas substantive due process "prevent[s] governmental power from being 'used for purposes of oppression.'" *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). Thus, this Court's decisions affording procedural due process protection to state-created liberty and property interests promote the constitutional concern that state and local governments utilize fundamentally fair procedures in deciding whether to deny interests or "rights" in which the State has created an expectation. *See Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). However, as a matter of substantive due process, the decision to withdraw—or failure to provide—a benefit or interest created solely as a matter of state law cannot be deemed an act of "oppression." It is one thing to say, as a matter of procedural due process, that a state-created interest cannot be withdrawn unfairly or arbitrarily, and it is quite another to say that

such an interest cannot be withdrawn at all.[9] For this reason, state-created liberty or property interests ordinarily do not and should not merit substantive due process protection.

Furthermore, even if substantive due process might under some circumstances impose an absolute constitutional constraint on the deprivation of some state-created liberty or property interests, application of such a doctrine is inappropriate in this case, where the "liberty interest" claimed is not a right to be free from governmental interference but a right to affirmative governmental assistance (*i.e.*, a right to a certain level of safety). The difference between a statute protecting the individual from state action and a statute requiring the State to protect the individual is a difference in kind, not degree. As discussed *supra*, pp. 14-18, except in the custodial context, due process traditionally has been implicated only by state *deprivation* of protected interests. For this reason, a statute that mandates government services ordinarily should not be presumed to create an interest protected by substantive due process.

Another reason that the Act does not create a protected liberty interest is that the Act is not narrowly drawn to mandate the provision of specific benefits or protections by the State and its subdivisions, but is applicable to public and private employers alike. In every case in which this Court has found a state statute to confer due process rights, the statute has specifically been designed to govern the relationship between the State and a defined group of individuals, in most cases either state prisoners

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[9] Obviously, a decision that a state-created intereset or right is subject to substantive due process protection has a far greater impact than a holding that the same interest is subject to procedural due process protection. Fundamental principles of federalism counsel that this Court be extremely reluctant to find that the States, by creating statutory "entitlements," have as a constitutional matter placed themselves and all of their subdivisions in a rigid position where they cannot under any circumstances deny these benefits.

or state employees. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (statute governing right of civil servants to continued employment); *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979) (statute governing right of prisoners to parole). In such instances, it may be reasonable to assume that the statute was intended to create a private interest against the State that is subject to consitutional protection.

Where, however, as here, the statute governs primarily relations among private parties, and only incidentally reaches the State and its subdivisions, the more reasonable assumption is that the legislature intended to put relations between individuals and the State on the same footing as those between private parties. Clearly, there is no federal constitutional interest involved in enforcement of an employee's "rights" under the Act against a private employer. The legislature's simple act of subjecting the City to the same strictures as a private employer should not therefore be assumed to create a federal constitutional right against the City. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("[m]ere violation of a state statute does not infringe the federal Constitution"); *Paul v. Davis*, 424 U.S. 693, 700 (1976).[10]

In order to decide this case, it is not necessary for this Court to hold that any one of the factors distinguishing petitioner's claim from the precedents she cites in itself defeats her due process claim, although there are strong arguments for a bright-line rule. Rather, the Court need only decide that it will not infer a substantive due process

[10] This analysis is not inconsistent with the case law holding that once a State has created a due process interest, the procedural protections to be afforded that interest must be determined by federal law. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). In this instance, the Texas statute is not being used to define the procedural protections which the City must afford. To the contrary, it is used to argue whether Texas has created any substantive right at all, a function which all the cases acknowledge is the prerogative of the State.

right to a governmental service mandated by a statute of general applicability to private parties as well as to the State, especially where state law provides a remedy to a person who is injured by the state or local government's failure to comply with the statute. Any other conclusion would effectively constitutionalize all tort claims against a State or its subdivisions whenever their conduct is governed by any form of state regulation. Clearly, the Due Process Clause was not intended and has never been interpreted to have such a broad effect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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